UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	**Case No. 96 B 04594**
	)	**No. 96 B 94596**
APEX AUTOMOTIVE WAREHOUSE, L.P. an Illinois limited partnership, and THE WHITLOCK CORPORATION, a Minnesota corporation,	)	**(Jointly Administered)**
Debtors.	)	
	)	
APEX AUTOMOTIVE WAREHOUSE, L.P., now known as THE WHITLOCK CORPORATION,	)	
Plaintiff,	)	**Case No. 96 A 1123**
v.	)	
	)	
WSR CORPORATION, and DELOITTE & TOUCHE L.L.P.,	)	**Judge Erwin I. Katz**
Defendants.	)	
	)	
WSR CORPORATION, a Delaware corporation, and R&S/STRAUSS, a Delaware corporation,	)	
Counterclaimants,	)	
	)	
v.	)	
	)	
APEX AUTOMOTIVE WAREHOUSE, L.P., an Illinois limited partnership, and THE WHITLOCK CORPORATION, a Minnesota corporation,	)	
Counterdefendants.	)	

MEMORANDUM OPINION

This adversary proceeding relates to the bankruptcy cases of Apex Automotive, L.P. ("Apex") and The Whitlock Corporation ("Whitlock") [1]. Apex has filed a Second Amended

[1] On February 22, 1996, Apex and Whitlock filed voluntary petitions for protection under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 et. seq. On September 24, 1996, Apex and

Complaint adding Deloitte & Touche L.L.P. ("Deloitte") as a defendant to its lawsuit against WSR Corporation ("WSR"). Apex asserts numerous counts against Deloitte. These counts are based on Deloitte's alleged active participation with WSR in a fraud perpetrated on Apex in connection with Apex's January 1995 acquisition of Whitlock.

This matter is before the Court on Deloitte's Motion to Dismiss or for Summary Judgment. For the following reasons, the Court grants the Motion for Summary Judgment.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1334(b) and General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. This matter is a non-core proceeding under 28 U.S.C. § 157(c)(1). Venue is appropriate under 28 U.S.C. §1409(a)

BACKGROUND

The following facts were taken from the 402M and 402N statements and Deloitte and Apex's briefs:

On January 27, 1995, Apex purchased all the outstanding shares of stock of Whitlock from WSR, pursuant to a Stock Purchase Agreement dated December 6, 1994 (the "Stock Purchase Agreement"). Prior to the acquisition, Apex was in the wholesale auto parts business; Whitlock operated retail auto parts stores.

As part of the purchase transaction, Apex and WSR agreed that WSR would strip about thirty of the retail auto parts stores out of the assets of Whitlock, prior to the sale. Because Apex was acquiring a newly configured Whitlock entity, WSR, as the seller, had to create financial

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Whitlock emerged from bankruptcy jointly as The Whitlock Corporation. This opinion continues to refer to Apex and Whitlock by their historical names to avoid confusion.

statements to describe for Apex what it would be purchasing. Whitlock provided to Apex an unaudited, pro forma balance sheet of Whitlock as of September 3, 1994, which was attached to the Stock Purchase Agreement as Schedule 3.7.

Section 2.4 of the Stock Purchase Agreement required that, after the closing of the transaction, WSR was to prepare a balance sheet which accurately reflected the value of Whitlock as of the closing date of the transaction. This closing balance sheet was to include information necessary to determine a closing book value for Whitlock as of the closing date. The closing balance sheet was to be audited by Deloitte. Apex and WSR agreed that the costs and expenses for the services of Deloitte in conducting the audit would be shared equally by both. The closing balance sheet was never delivered to Apex.

Soon after the closing of the transaction, problems developed. Apex declared the following in its bankruptcy proceeding: "Almost immediately after the Acquisition, Apex found that the Acquisition had placed it and Whitlock into severe financial trouble for the simple reason that Apex had paid too much for Whitlock." Moreover, on or about April 25, 1995, Neal Tyson ("Tyson"), an outside accountant for Apex, sent a memorandum to David Carmell, president of Apex's general partner, stating that he had "come to the conclusion that what they did was to intentionally mislead you as to how they would value the inventory." Apex and Deloitte dispute who the term "they" refers to in the memorandum. In the memorandum, Tyson recommends that Apex consult its lawyers regarding its legal options.

Apex filed its first Complaint on October 5, 1995. Apex sought a declaratory judgment against WSR and Deloitte regarding a dispute among the parties about the appropriate manner to calculate certain items necessary to determine the closing book value. Apex sought a declaration

by the court, that the closing book value be calculated in accordance with Apex's wishes. The following year, in April 1996, Apex voluntarily dismissed Deloitte from the action. In October 1996, Apex filed an Amended Complaint to include a fraud count and several other counts against WSR.

On May 13, 1998, Apex sought leave to add Deloitte to this action. The Second Amended Complaint includes five Counts against Deloitte: fraud, negligence/accounting malpractice, breach of contract, breach of fiduciary duty and conspiracy to defraud. In sum, Apex alleges that WSR and Deloitte each knew, prior to the sale of Whitlock to Apex, that WSR's and Whitlock's books and records were grossly unreliable and inaccurate. Further, each misrepresented to Apex, by affirmative false statements, by providing deliberately incomplete and misleading financial information, and by other omissions, the state of Whitlocks' finances in order to induce the sale and to inflate the sale price. After the closing of the transaction, Apex alleges that WSR and Deloitte participated in a scheme to continue to conceal the true condition of Whitlock from Apex. Lastly, Apex alleges that Deloitte had a fiduciary duty to disclose information to Apex of any problems with Whitlock's financials.

Deloitte moves to dismiss or for summary judgment on the basis of two arguments: (1) that all of Apex's claim against it are barred by a two year statute of limitations governing the case; and (2) that the breach of fiduciary duty claim should be dismissed for failure to state a claim because Deloitte's role was that of an independent auditor and thus Deloitte did not stand in a fiduciary relationship with Apex.

Deloitte relies on an October 6, 1995 letter from David Carmell sent to WSR and Deloitte for support of its statute of limitations defense. The letter in part provides the following:

> "Apex's lawyers are continuing their investigation into whether WSR and/or Deloitte face liability for damages arising from (1) an adverse material change in the condition of the business; (2) breaches of representations and warranties with respect to WSR's financial statements; (3) other omissions, errors and irregularities in WSR's books, records and audited financial statements; and (4) other breaches of the Stock Purchase Agreement."

Deloitte argues that the letter is uncontroverted proof that Apex was aware of possible claims arising from Deloitte's conduct in October 1995 and therefore the statute of limitations began to run then and expired two years later in October 1997. In other words, before Apex filed the Second Amended Complaint adding Deloitte to its lawsuit pending against WSR.

Apex counters with several arguments: (1) that the statute of limitations had not run before it filed its Second Amended Complaint to include Deloitte because it was not triggered until 1997 when through discovery Apex allegedly learned of Deloitte's complicity; (2) that Deloitte actively prevented it from discovering Deloitte's involvement in the misrepresentation and therefore the doctrines of fraudulent concealment and equitable estoppel tolled the running of the statute of limitations; and lastly, (3) that the Motion to Dismiss the breach of fiduciary duty Count for failure to state a claim should be denied because while independent contractors usually do not have fiduciary duty, Deloitte allegedly agreed to act as a advisor to Apex informing Apex of any problems with Whitlock's financial statements, and thus Deloitte was more than an independent auditor.

DISCUSSION

A motion for summary judgment in a bankruptcy matter is governed by the same standard applicable to civil proceedings. See Fed.R.Bankr.P. 7056 (incorporating Fed. R.Civ.P. 56). Accordingly summary judgment is proper when the "pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, demonstrate the absence of a genuine issue of material fact." Fed. R.Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A "genuine issue of material fact" exists if there is sufficient evidence for a jury to return a verdict in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The court must evaluate the admissible evidence and inferences therefrom in the light most favorable to the nonmoving party. See id. at 255; Liberles v. County of Cook, 709 F.2d 1122, 1129 (7th Cir. 1983).

STATUTE OF LIMITATIONS

Illinois law provides the applicable statute of limitations for Apex's claims against Deloitte because "statute of limitations considerations are deemed 'procedural' requiring application of the forum state's law." In re UNR Indus., Inc., 92 B.R. 319, 331 n.7 (Bankr. N.D. Ill. 1988) (citing Restatement (2d) of Conflicts of Laws S 142 (1972)). "In any event, the parties to a lawsuit can, within broad limits, stipulate to the law governing their dispute." Cates v. Morgan Portable Bldg. Corp., 780 F.2d 683, 688 (7th Cir. 1985). Apex and Deloitte here have impliedly stipulated to the application of Illinois law by relying on Illinois law in their statute of limitations arguments. An implied stipulation is good enough. Id.

The defendant Deloitte is a public accounting firm; therefore, the applicable Illinois statute of limitations for claims against Deloitte is found in 735 ILCS § 5/13-214.2(a) and reads as follows:

> Actions based upon tort, contract or otherwise against any person, partnership or corporation registered pursuant to the Illinois Public Accounting Act, as amended or any of its employees, partners, members, officers or shareholders, for an act or

> omission in the performance of professional services shall be commenced within 2 years from the time the person bringing an action knew or should reasonably have known of such act or omission.

In Illinois, the "discovery rule" governs statutes of limitations such as 735 ILCS § 5.13/214.2(a). City Nat'l Bank of Fl. v. Checkers, Simons & Rosner, 32 F.3d 277, 282 (7th Cir. 1994). The effect of the discovery rule is to postpone the starting of the period of limitations until the person knows or reasonably should know of his injury and also knows or reasonably should know that is was wrongfully caused. Id. at 283 (citing Knox College v. Celotex Corp., 88 Ill.2d 407, 415, 58 Ill.Dec. 725, 729, 430 N.E.2d 976, 980 (1982). At that time, the injured party is under an obligation to inquire further to determine whether an actionable wrong was committed. Id.

Apex contends that the statute of limitations did not begin to run in 1995 because it did not and could not know of Deloitte's complicity in WSR's fraud until document production in 1997. Upon reviewing the documents produced in 1997, Apex alleges it learned that Deloitte had known throughout the purchase negotiations to warn Apex, and that Deloitte, in fact, had helped to prepare that allegedly false financial information. Only then, Apex alleges, did it have reason to believe that Deloitte was a cause of Apex's injury and that Deloitte's conduct in participating in the fraud had been wrongful. Both parties cite to numerous cases to support their arguments but there is one Seventh Circuit case that deals with the precise issue at hand.

In LeBlang Motors, Ltd., v. Subaru of America, Inc., 148 F.3d 680 (7th Cir. 1998), the court affirmed the dismissal of claims against two individuals added later as defendants to an existing fraud action, as time barred. The plaintiff's claims were based on an alleged fraud in its acquisition of a car dealership but the plaintiff had initially filed suit only against the employer of

the two individuals. The plaintiff later sought to add the two individuals. The court held that the fraud action accrued against "all potential defendants" when the plaintiff learned that information it had received before the acquisition was false. The court rejected the plaintiff's argument that its claims had accrued only against the company but not against the two individual defendants, until it learned, through discovery, of the two late-added defendant's complicity in the company's fraud. Id. at 691.

Similarly, Apex cannot contend that the claims it alleges against Deloitte did not accrue until Apex conducted discovery and became aware of Deloitte's complicity; that Apex did not know of Deloitte's complicity is irrelevant. Id. Under LeBlang, Apex's claims against Deloitte and all potential defendants began to accrue by October 1995, when Apex sent the letter to WSR and Deloitte stated that it was investigating their potential liability. This letter established that Apex believed at the time that it had been injured, and believed that the injury was caused by inter alia omissions, errors, irregularities and breaches of representations with respect to WSR's financial statements. Therefore, Apex knew both that an injury had occurred and that it was wrongfully caused; this knowledge is all that is required for the statute of limitations to begin running in Illinois. Id. That Apex believed that WSR misrepresented the financials of Whitlock is sufficient; this awareness triggered the "an obligation to inquire further to determine whether an actionable wrong was committed." Id.

A thorough investigation mandates that Apex consider the potential liability of all parties involved in supplying the financial information. Id. Deloitte was one such party; therefore, it should have been included in Apex's investigation.

Apex continues to allege that it did not know prior to discovery of Deloitte's assistance in

preparing the unaudited pro forma balance sheet attached to the Stock Purchase Agreement. As in LeBlang, Apex cannot suggest that it did not know of Deloitte's involvement since Apex asserts in its Second Amended Complaint that Deloitte had contractual and other duties to disclose information prior to Apex's acquisition of Whitlock; moreover, Apex asserts that prior to the closing Deloitte provided Apex with inventory-related workpapers for Whitlock and its audit report for fiscal year 1994, which supported an unqualified Deloitte audit opinion for the consolidated WSR entity as of January, 1994. Apex alleges that these documents and others were provided with the intention that Apex rely on them and that Apex did rely on them in deciding to purchase Whitlock; Apex also alleges that these documents were misleading. Therefore, even if Apex was not aware of Deloitte's alleged involvement in the preparation of the unaudited pro forma balance sheet, Deloitte participated in the flow of some financial information to Apex; thus, when there was a problem with the financial statements, Apex had a duty to investigate all the parties that had prepared financial information that Apex had relied upon. Apex's cause of action accrued against both WSR and Deloitte in October 1995. Apex did not have the right to wait until years later, when pretrial discovery uncovered information that may have supported a cause of action against Deloitte. See Singletary v. Continental Ill. Nat'l Bank & Trust Co., 9 F.3d 1236, 1243 (7th Cir. 1993)(applying Illinois statute of limitations in a fraud action and holding "[t]he significance of [plaintiff] having known ... that he had been wronged, even if he was not sure by whom, should thus be apparent: knowing that he had been wronged, he was obliged as a reasonable person to begin inquiring as to who might have wronged him").

Apex disputes that LeBlang is directly apposite and relies on Antell v. Arthur Anderson LLP, 1998 WL 245878 (N.D. Ill.) as the applicable authority. In Antell, a putative class action

was filed against the Discovery Zone and its officers for fraud in inflating the price of the company's stock by using false and misleading financial information; Arthur Andersen was the accounting firm that audited the financial statements of Discovery Zone and issued "clean" audit opinions. Several years later, Arthur Andersen, produced documents that indicated for the first time that Arthur Andersen acted with scienter in the alleged accounting manipulations. Based on this information the putative class representative sought leave to file an amended complaint asserting similar fraud claims against Arthur Andersen. Arthur Andersen argued that the claims were barred by a one year statute of limitation. Arthur Andersen argued that when the class filed a claim against Discovery Zone, the class was on notice that Arthur Andersen as auditor of the purported fraudulent financial statements may have participated in the alleged fraud. The court held that the pleadings in the action against Discovery Zone did not conclusively put the class on inquiry notice of Arthur Andersen's supposed recklessness or intentional misconduct. The pleadings could have simply put the class on notice that Arthur Andersen acted in a negligent manner. Id. at *4.

An important fact that Apex fails to mention is that Antell was decided a month before LeBlang. Further, Antell is a District Court decision and LeBlang was decided by the Seventh Circuit Court of Appeals. Therefore, LeBlang is the latest authority and provides binding precedent for this court. Finally, although, not necessary, Antell can be distinguished because there is no evidence that the putative class was aware of reckless or intentional misconduct on the part of Arthur Andersen before document production. Here, on the other hand, the October 1995 letter indicates that Apex was investigating claims against Deloitte for similar conduct as that Apex later alleges in its Second Amended Complaint. The October 1995 letter mentions Apex

investigation into Deloitte's liability for inter alia, omissions, errors and breach of representation in connection with the WSR financial statements. Thus, Apex possessed this knowledge before document production occurred.

FRAUDULENT CONCEALMENT AND EQUITABLE ESTOPPEL

Under LeBlang, it is clear that the statute of limitations began to run not after Apex's alleged discovery of Deloitte's complicity in 1997, but rather in October 1995; hence the two year limitations period expired in October 1997, before Deloitte was added to the lawsuit. The only hope for Apex is one of the doctrines that permit the running of a statute of limitations to be suspended or tolled even if the accrual date has passed. Apex invokes two: equitable estoppel and fraudulent concealment.

Equitable estoppel is a doctrine that tolls the running of a statute of limitations during any period in which the defendant took active steps to prevent the plaintiff from suing. Singletary, 9 F.3d at 1241 (citing Witherell v. Weimer, 118 Ill.2d 321, 113 Ill.Dec. 259, 263, 515 N.Ed.2d 68, 72 (1987)). The steps taken must have been affirmative efforts to delay the plaintiff from bringing suit before the statute of limitations has run. Id. This doctrine does not require an intent by the defendant to mislead, deceive or delay. Actions such as promising the plaintiff not to plead the statute of limitations pending settlement talks or actively concealing evidence constitute affirmative efforts sufficient to toll the statute. Id. Mere denial of liability or refusal to cooperate in making the plaintiff's case is insufficient. Id. Mere denial of liability cannot be the foundation of an equitable estoppel unless the defendant was in a fiduciary relationship with the plaintiff, entitling the latter to rely on the advice of the former. Id. Apex alleges that both before and after

the closing of the transaction, Deloitte intended to and did foster a relationship of trust with both WSR and Apex, occupying the position of an "honest broker" and independent intermediary. However, that one party trusts the other is insufficient to create a fiduciary relationship. "We trust most people with whom we choose to do business". Pommier v. Peoples Bank Marycrest, 967 F.2d 1115, 1119 (7th Cir. 1992).

Equitable estoppel is "available only under limited circumstances." Smith v. City of Chicago Heights, 951 F.2d 834, 840 (7th Cir. 1992). To prove estoppel successfully, the plaintiff must show that the defendant's conduct was improper, and that the plaintiff was harmed by such conduct. Id. Among other factors courts should look for a "showing of the plaintiff's 'actual and reasonable reliance on the defendant conduct or representations' " and" 'evidence of improper purpose on the part of the defendant and the defendant's actual or constructive knowledge of the deceptive nature of its conduct." Id. at 841.

Apex also relies on the doctrine of fraudulent concealment. Fraudulent concealment is a doctrine that gives the injured party five years within which to bring a suit after he discovers the cause of action if a defendant has fraudulently concealed the existence of a cause of action. 735 ILCS 5/13-215; Smith, 951 F.2d at 840. Although sometimes used interchangeably with equitable estoppel, fraudulent concealment is "strictly a subset" of the latter, since neither fraud nor concealment is required for equitable estoppel. Singletary, 9 F.3d at 1241.

Fraudulent concealment presupposes that the plaintiff has discovered, or, as required by the discovery rule, should have discovered, that defendant injured him, and denotes efforts by the defendant to prevent the plaintiff from suing in time. Id. at 841. There must be affirmative acts or representations which are calculated to "lull or induce a claimant into delaying filing of his

claim or to prevent a claimant from discovering his claim." Smith v. Cook County Hospital, 164 Ill.App.3d. 857, 862, 115 Ill.Dec. 811, 815, 518 N.E.2d 336, 340 (1st App.1987). Mere silence on the part of the defendant or failure of the claimant to learn of the cause of action are not enough. Id. Fraudulent misrepresentations which constitute the basis of the claim do not amount to fraudulent concealment unless these actions tended to conceal the cause of action. Id. If the party affected by the fraud discovers the fraudulent concealment, or should have discovered it through ordinary diligence, and a reasonable time remains within the remaining limitations period, fraudulent concealment will not toll the running of the statute of limitations period. Id.

There are several events that Apex refers to as invoking fraudulent concealment or calling into issue equitable estoppel. However, only two of the events would constitute affirmative actions as required by the statute. One event concerns the creation of the unaudited pro forma balance sheet. On March 8, 1995, Apex's controller and treasurer, Daniel Pastron ("Pastron") sent a letter to Deloitte regarding fifteen separate accounting issues, asking Deloitte to resolve these issues with WSR. On March 23, 1995, Deloitte wrote a letter stating:

> In response to your letter dated March 8, 1995 to Jonathan Rothman of Deloitte and Touche, L.L.P. we have forwarded your letter to the management of WSR and asked them to respond to each of your issues. We will consider their response in connection with our audit... The balance sheet of The Whitlock Corporation is the responsibility of the management of Whitlock.

Through discovery an invoice of Deloitte was found dated January 31, 1995 which states: "For professional services rendered and expenses incurred in connection with assistance in preparing a pro forma, Whitlock West balance sheet and other services requested by you in assisting the purchaser in their due diligence." Deloitte admits that the invoice does contain the quoted language but Deloitte denies that it was responsible for the Whitlock West balance sheet

referenced in the invoice. Deloitte cites to the AICPA Professionals Standards which contains U.S. auditing standards. AICPA allows an auditor to draft financials but confines the auditor's responsibility for the financial statements to the expression of his opinion on them. AICPA Professional Standards, AU ¶ 110.02. Irrespective of the audit standards, the letter does not constitute concealment. The second incident concerns when Pastron saw numerous errors in the accounts payable and he sent a letter dated May 31, 1995 to WSR asking "how all the items we are finding incorrect got past your accounting department and Deloitte and Touche". Pastron remembers that it was either Deloitte or WSR who responded to his inquiry by claiming that Deloitte had no knowledge of this fact because it allegedly had not yet completed the accounts payable field work for its post-closing audit. Apex alleges that Deloitte's independent presence and its responses to Apex's inquiries put distance between Apex and any notion that Deloitte had behaved wrongfully and that Apex allegedly relied upon that conduct and those representations and was allegedly put off the scent in its inquiries to determine who did wrong.[2] Again, these are not acts of concealment. Further, neither of these incidents invoke the doctrines of fraudulent concealment or equitable estoppel. The actions that Apex alleges that Deloitte committed and which Apex relied on occurred in April and May of 1995. In other words, the actions occurred months before the October 1995 letter was written stating Apex's intentions to continue to investigate the liability of WSR and Deloitte. Clearly as evidenced by the letter, Apex did not rely on those affirmative actions and thought there might still exist liability against Deloitte for its

[2] Apex also alleges that Deloitte failed to provide Apex with management letters that Deloitte submitted to WSR after its audits in 1993, 1994 and 1995. These management letters Apex alleges, demonstrated the inaccuracy and unreliability of WSR's financials. However, Apex asserts in its Second Amended Complaint, that it requested the management letters from WSR and not Deloitte.

injury.

CONCLUSION

For the above reasons, Deloitte's Motion for Summary Judgment on all Counts is granted.

Entered:

Date:

_____
Honorable Erwin I. Katz
United States Bankruptcy Court